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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, and CYNTHIA KOONCE MILLER,

Appellants,

—v.—

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, Governor; LOUIS L. GOLDSTEIN, Comptroller; JOHN A. LUETKEMEYER, Treasurer; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; and THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE IN THE CITY OF BALTIMORE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR APPELLANTS

LAWRENCE S. GREENWALD
Attorney for Appellants
1200 Garrett Building
Baltimore, Maryland 21202

MELVIN L. WULF
American Civil Liberties
Union Foundation
22 East 40th Street
New York, N. Y. 10016
Of Counsel

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775
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BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, Governor; LOUIS L. GOLDSTEIN, Comptroller; JOHN A. LUETKEMEYER, Treasurer; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; and THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE IN THE CITY OF BALTIMORE, INC.,

Appellees.

ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

BRIEF FOR APPELLANTS

OPINIONS BELOW

The majority and dissenting opinions of the three judge district court for the District of Maryland are reported in Roemer v. Board of Public Works of State of Maryland, 387 F. Supp. 1282 (D. Md. 1974). Certain preliminary rulings not at issue here are reported in American Civil Liberties Union of Maryland v. Board of Public Works of State of Maryland, 357 F. Supp. 877 (D. Md. 1972).

JURISDICTION

The judgment of the district court was filed on October 21, 1974. A./1 57-58. A notice of appeal therefrom was filed on October 25, 1974.

/1 Abbreviations in this brief refer to the following:

"A." -- Appendix to Jurisdictional Statement

"App." -- Single Appendix

"R." -- Trial transcript

"PX" -- Plaintiffs' Exhibit

"DX -- Defendant's Exhibit

"Rec." -- Record

This Court noted probable jurisdiction on March 24, 1975. Jurisdiction is conferred by 28 U.S.C. §1253.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law respecting an establishment of religion ...".

The Fourteenth Amendment, Section 1, to the United States Constitution provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The challenged legislation, Annotated Code of Maryland, Article 77A, §§65-69, as amended, is printed in the appendix to jurisdictional statement at A.52-56.

QUESTIONS PRESENTED

I. Whether the Act is unconstitutional because continuing payments of undefined aid to church related institutions and

continuing state analyses to guarantee that aid is not used for religious purposes necessarily foster excessive government entanglement with religion or the potential therefor.

II. Whether the primary effect of the Act is to advance religion in the following respects:

A. Its failure to guarantee that state aid will not be used to advance religion.

B. Its financial support of classes in which prayer is regularly recited.

C. Its financial support of institutions which impose religious restrictions on faculty appointments and perpetuate de facto religious restrictions on student admissions.

D. Its financial support of institutions whose secondary purpose is to encourage spiritual development and which require students to take a limited range of courses in theology and doctrine taught primarily or exclusively by clerics of the affiliated church.

E. Its financial support of sectarian institutions.

III. Whether, if the challenged legislation is unconstitutional, appellees should be required to refund all payments not enjoined upon motions or application timely filed by appellants.

STATEMENT OF THE CASE

Proceedings Below

This action challenges the constitutionality of Maryland legislation (herein sometimes called "the Act") which authorizes direct payments of public aid to both church related and non-church related colleges and universities. A.2-3, 52-55. Appellants, plaintiffs below, are four Maryland citizens and taxpayers (A.2), who have standing pursuant to Flast v. Cohen, 392 U.S. 83 (1968). Appellants contend that the Act is a law respecting an establishment of religion in violation of the First and Fourteenth Amendments to the United States Constitution. They seek injunctive and declaratory relief against the governor, comptroller and treasurer of Maryland, constituting the Board of Public Works of the State of Maryland, and four/2 church related institutions of higher education.

/2 Originally, five such institutions were parties. However, by virtue of a compromise, the appeal as to Western Maryland College has been dismissed.

A three judge district court was convened below pursuant to 28 U.S.C. §§2281 and 2284. Following extended trial, briefs and oral argument, the lower court, by a 2-1 decision, upheld the constitutionality of the Act, as amended. Judgment was entered accordingly, and this appeal is taken therefrom.

During the pendency of the litigation below, most funds designated for the appellees were held in escrow. A.37, n.2. By amendment to §67 of the Act effective July 1, 1973, the formula by which the amount of aid was computed was amended to include an allotment of aid based upon graduate degrees awarded. A.56. Upon learning of the State's intent to pay two defendants that portion of their aid allotment based upon graduate degrees, appellants moved for a preliminary injunction against such payment. App. 16. The motion was denied for lack of jurisdiction. App. 18.

Following judgment against appellants, a motion for injunction pending appeal was filed with the district court, and was denied. Rec. 1741, 1811. Thereafter, an application for injunction pending appeal was filed with Chief Justice Burger. On November 25, 1974, the application was denied by a 5-3 vote of this Court.

The Challenged Legislation

The challenged legislation "provides public aid in the form of non-categorical grants" to private colleges and universities in the State. A.2. As originally passed the Act contained no restrictions as to use of the aid. The lower court held this form of legislation unconstitutional. A.23. During the pendency of litigation, §68A of the Act was promulgated, proscribing the use of aid "for sectarian purposes". A.54.

Notwithstanding §68A, there is no restriction against use of the aid to pay the salaries of teachers. R.1519-1523. There is no restriction against use of the aid for scholarships, and at least one appellee has already used the aid for this purpose. R.1478-1480. In administering the Maryland program, the State makes no further inquiry as to use upon learning that aid is used for scholarships. R.1519-1523.

Also, there is no restriction against use of the aid for the maintenance and repair of buildings, nor is any attempt made to restrict use of the aid to the upkeep of facilities used exclusively for secular purposes. A.52-55. In fact, buildings are used for a variety of religious purposes. See A.39-40, 44, 46.

At the time of trial, no specific guidelines for use of aid had been issued by the State. R.1504-1509.

Nor had the State made any effort to ascertain how funds already paid to the church related appellees had been used. R.1501. Although the State requires recipients to adopt internal accounting and administrative procedures to control the use of aid, it does not review the adequacy of such procedures. R.1510-1511. Moreover, there are no reviews of class schedules or course descriptions to guard against sectarian use. R.1519-1523; see A.18.

Two levels of screening are employed in an effort to ascertain that State aid is not used for sectarian purposes. First is a determination as to the eligibility of applicants, who are ineligible if they award primarily theological or seminary degrees. A.47. Second is a determination of whether State aid has been improperly used. Ibid. This second level is implemented through affidavits by the college president that funds will not be and have not been improperly used. A.48. A usage description is furnished to the State following distribution of funds to determine whether the college's expenditure was sectarian in nature. Ibid. State audit is available, and the district court found this to be "quick and non-judgmental". Ibid.

The Appellee Institutions

The court below found that the appellee institutions were all

church related, and conformed closely to the colleges approved in Tilton v. Richardson, 403 U.S. 672 (1971). A.3, 4, 10, 11. At all appellees there is a practice of starting classes with prayer. A.39. Some instructors wear clerical garb, and some classrooms have religious symbols. A.40.

One appellee, Loyola College, attempts to recruit two members of a religious order to its faculty each year. A.41. Also, at the time of trial, Loyola had an affirmative policy of increasing Jesuit presence on campus from eleven to twenty over a five year period. R.1219-1220. The Court below found that two other appellees favor members of religious orders as faculty for budgetary reasons. A.41. The evidence plainly shows that religious reasons also were a basis for such preference. See pp. 64-66, infra.

Although the trial court found that students are admitted without regard to religion (A.44), the evidence plainly shows that each college's recruiting efforts were concentrated largely toward one religious group See pp. 66-69, infra. As the trial court found, "the religious affiliation of the college would be readily apparent to any prospective applicant who took the time to read the catalogue." A.43.

The district court found itself unable to characterize the manner

in which theology and religion are studied at these schools. A.46. "However, a department staffed mainly by clerics of the affiliated church and geared toward a limited array of the possible theology or religion courses affords a congenial means of furthering the secondary objective of fostering religious experience." Ibid. To avoid excessive entanglement the district court held that State aid could not support theology programs. A.13.

All but one of the appellee colleges have, or recently had, religious quotas for membership on the governing board. A.43. All appellee institutions are affiliated with the Catholic Church, and the great majority of students at each is Catholic. A.44. Religious exercises are held on each campus, though attendance is not required. Ibid. The chaplain at each college is a clergyman of the affiliated church. A.44-45. Moreover, all of the appellee institutions have as a secondary objective the encouragement of spiritual development of students. A.45.

One appellee, Mount Saint Mary's College, is a corporation which operates both an undergraduate college and a seminary for the preparation of candidates for the priesthood. R.862; PX 81, Art. I, p. 1 (R.710); PX 79, p. 13 (R.710). There are numerous sharings between the undergraduate college and seminary, including the same corporate board of trustees

(R.862), the same director of public relations, comptroller and librarian (R.864), the same faculty in substantial measure (R.867), the same faculty meetings (R.871), the same bank account (R.871), the same dining and laundry facilities (R.866), the same living quarters for undergraduate seminarians (R.867), and sometimes the same religious observances (R.865-866).

SUMMARY OF ARGUMENT

Appellants contend that the challenged legislation is unconstitutional, because it fosters an excessive government entanglement with religion or potential therefor, and its primary effect advances religion.

Excessive Entanglement

The considerations relevant to determining whether a particular aid program fosters excessive government entanglement with religion are the character and purposes of the institutions benefited, the nature of the aid, and the resulting relationship between government and the religious authority. Tilton v. Richardson, 403 U.S. 672, 678 (1971). The nature of the aid and resulting church-state relationships or potential therefor under the Maryland aid program offer vivid contrasts to the program upheld in Tilton, and render the Act unconstitutional.

Aid to church related institutions of higher education can be sustained only for carefully limited forms of secular, neutral or nonideological

services, facilities or materials, such as construction grants. However, the Maryland aid is virtually unlimited in scope. As Judge Bryan succinctly stated in dissent below:

> "Of telling decisiveness here is the payment of the grants directly to the colleges unmarked in purpose ...." A.29. (Emphasis added.)

If the virtually unlimited form of aid upheld below is constitutionally permissible, then contrary to this Court's consistent holdings since 1971, the nature of aid as a criterion in any entanglement analysis becomes meaningless.

In order to guarantee that Maryland aid is not used for sectarian purposes, continuous and pervasive analyses of the schools' usage of aid will be required; and it is doubtful that even such analyses can effectively protect against religious use. Moreover, such analyses of annual payments of aid are precisely the continuing type of relationship between government and church related institutions which this Court has consistently rejected.

In short, the nature of the aid and resulting church-state relationships necessarily foster an excessive government entanglement with religion or potential therefor. Therefore, the challenged legislation is a law respecting an establishment of religion and is unconstitutional.

Primary Effect

The primary effect of the challenged legislation is to advance religion in numerous respects. Contrary to the requirement stated in several of this Court's decisions, the State fails to effectively guarantee that aid is not used for religious purposes. Aid may be used for virtually unlimited purposes, including teacher salaries, scholarships and building maintenance and repair. The "greater governmental surveillance" required by Tilton, 403 U.S. at 688, as a check on salary aid simply does not exist under the Maryland program; and State inquiry is nonexistent as to ultimate use of scholarship funds and the uses of buildings maintained and repaired by State aid. Also, aid may be used to support classes in which there is a practice of prayer recitation.

Aid supports colleges which impose religious restrictions on faculty appointments in the sense that such colleges have affirmative policies or practices to recruit members of designated religious orders. Aid also supports colleges which impose de facto religious restrictions on student admissions in the sense that their recruiting efforts are concentrated primarily toward persons of a particular religion. Aid also supports colleges whose secondary objective is to encourage spiritual development and which require students to take a limited range of courses in theology

and doctrine taught primarily or exclusively by clerics of the affiliated church. Lastly, aid supports institutions which appellants contend are sectarian.

For these reasons the primary effect of the aid program is to advance religion; and the challenged legislation is an unconstitutional law respecting an establishment of religion.

Repayment of Aid

If the challenged legislation is held unconstitutional, the appellee institutions should be required to repay all aid not enjoined upon motions or application timely filed by appellants. Otherwise, to the extent aid has been paid, appellants are totally deprived of a remedy, and the establishment clause is seriously eroded.

ARGUMENT

The first and fourteenth amendments proscribe any law "respecting an establishment of religion ...". The broad scope of this proscription has been explained as follows:

> "Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be 'no law respecting an establishment of religion'. A law may be one 'respecting' the

> forbidden objective while falling short of its total realization .... A given law might not establish a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

A law may be one respecting an establishment of religion "even though it does not aid one religion more than another but merely benefits all religions alike". Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973); accord, Abington School District v. Schempp, 374 U.S. 203, 220 (1963).

The state must strictly maintain an attitude of "neutrality", neither advancing nor inhibiting religion. Id. at 222; Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. at 788. Neutrality avoids sponsorship of religion, financial support of religion, and active involvement of the sovereign in religious activity, which are the three primary evils against which the establishment clause is intended to protect. Tilton v. Richardson, 403 U.S. 672, 677 (1971).

To survive this establishment clause challenge, the Act must

satisfy three criteria:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, ...; finally, the statute must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. at 612-613.

Appellants contend that the Act is unconstitutional, because it fosters an excessive government entanglement with religion, and its "primary effect" advances religion. No challenge is offered as to its secular legislative purpose.

I. THE ACT IS UNCONSTITUTIONAL BECAUSE CONTINUING PAYMENTS OF UNDEFINED AID TO CHURCH RELATED INSTITUTIONS AND CONTINUING STATE ANALYSES REQUIRED TO GUARANTEE THAT AID IS NOT USED FOR RELIGIOUS PURPOSES NECESSARILY FOSTER EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION OR THE POTENTIAL THEREFOR.

As early as 1948, this Court warned against excessive government involvement with religion. See McCollum v. Board of Education, 333 U.S. 203, 211-212 (1948). However, the definition and application of "entanglement" in recent church-state cases began in Walz v. Tax Commission, 397 U.S. 664 (1970),

where this Court upheld the constitutionality of tax exemptions for churches. In Walz Chief Justice Burger stated the principle of entanglement in this manner:

> "...[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards ...". Id. at 675. (Emphasis added.)

In his concurring opinion Justice Harlan echoed this warning against "programs, whose very nature is apt to entangle the state in details of administration and planning ...". Id. at 695.

Approximately one year after Walz, this Court was confronted with challenges to the constitutionality of Pennsylvania and Rhode Island statutes authorizing direct and indirect money subsidies to parochial elementary and secondary schools. Lemon v. Kurtzman, 403 U.S. 602 (1971). For the first time the Court stated the considerations

relevant to determining whether an aid program fostered excessive government entanglement with religion:

> "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." Id. at 615; Tilton v. Richardson, 403 U.S. at 678. (Emphasis added.)

These considerations are discussed below.

A. Character and Purposes of the Institution

1. Lemon v. Kurtzman

At issue in Lemon were statutes authorizing aid to church related elementary and secondary schools in Pennsylvania and elementary schools in Rhode Island. The Pennsylvania statute was reviewed upon dismissal of the complaint for failure to state a claim for relief. 403 U.S. at 620. Therefore, the allegations of the complaint as to the sectarian character and purposes of the schools were accepted as true, and no findings as to their character were made. Ibid.

However, detailed findings were made as to the character and purposes of the Rhode Island schools. In concluding that these schools involved "substantial religious activity and purpose", the Court relied upon specified religious characteristics. These included proximity of schools to parish churches, religious instruction, religious symbols in buildings, religiously oriented extracurricular activities, and the presence of dedicated members of religious orders. Id. at 615-616. Their importance was enhanced "by the impressionable age of the pupils ...". Id. at 616.

2. Tilton v. Richardson

At issue in Tilton was a federal statute authorizing grants and loans to private colleges and universities, including church related institutions, for the construction of academic facilities. As in Lemon consideration of whether the aid program fostered excessive government entanglement with religion required analysis of the character and purposes of the institutions.

The Court noted that "appellants themselves do not contend that these four institutions are 'sectarian'." Tilton v. Richardson, 403 U.S. at 685. A distinction was then drawn between "the religious aspects of church related institutions

of higher learning and parochial elementary and secondary schools." Ibid. At pre-college schools an affirmative policy is to assure future adherents to a particular faith. Id. at 685-686. At colleges, however, "students are less impressionable and less susceptible to religious indoctrination." Id. at 686. Moreover, the very nature of college courses and a high degree of academic freedom tend to limit sectarian influence. Ibid.

The Court then addressed the particular institutions at issue, and held that the record "would not support a conclusion that any ... departed from this general pattern." Ibid. None restricted faculty appointments or student admissions to members of the sponsoring religious order. Id. at 686. None required attendance at religious functions. Ibid. The parties stipulated that theology was taught academically. Ibid. Principles of academic freedom were maintained. Id. at 687. Therefore, contrary to Lemon, the Tilton institutions did not have "substantial religious activity or purpose".

3. The appellee institutions

The district court found that the appellee institutions conformed closely to the colleges approved in Tilton. A.10-11. The Court also found that "one secondary

objective" of all appellee institutions was "to encourage spiritual development of the students", and that "some of the defendants seem more caught up in this idea than others ...". A.45. However, the extent to which particular appellees are "caught up in this idea" was not detailed. Such detail is particularly important, because the more religiosity that pervades the institutions, the greater the risk that government aid will support religious activities and the greater the necessity for intensive government surveillance. See Tilton v. Richardson, 403 U.S. at 687.

Although the appellee institutions have certain characteristics of the Tilton schools, they also have characteristics of the Lemon schools. At the least they have substantial religious activity or purpose. Facts demonstrating the extent and intensity of religiosity at these institutions are offered throughout this brief, the "Appendix To Plaintiffs' Brief" filed below (Rec.1473), and plaintiffs' proposed findings of fact (Rec. 961-1011).

A number of distinctions between the Tilton institutions, as reflected in this Court's opinion, and the appelee institutions should be emphasized. Three institutions here have a policy or practice of favoring members of the sponsoring religion for certain faculty appointments. See pp. 64-66, infra. The recruiting practices of the colleges here, by encouraging applications from Catholic students, limit entry in large measure to Catholic students. See pp. 66-69, infra. The daily opportunities for worship on campus offered by the colleges here are limited to Roman Catholic religious services. And contrary to the stipulated academic teaching of theology in Tilton, the theology courses here are either admittedly taught for religious purposes (see pp. 70-73, infra), or are potentially taught in a religious manner. A.42, 45-46, 49-50.

Even absent these distinctions the nature of the aid and resulting church-state relationships or potential therefor under the Maryland program offer vivid contrasts to the program upheld in Tilton, and render the Act unconstitutional. A fortiori the presence of these distinctions, as well as substantial evidence that the advancement of religion is a substantial purpose and activity of the appellee institutions, cogently demonstrates

the existence of substantial risk that government aid will support religious activities. Correspondingly the necessity for intensive government surveillance is increased, as is the spectre of entanglement.

B. Nature of Aid

The majority opinion below dismissed any distinctions between the narrowly limited construction grants in Tilton and the virtually unlimited, undefined aid under the Maryland program as constitutionally insignificant. A.17. If aid in the virtually unlimited form upheld below is constitutionally insignificant, then the nature of aid as a criterion in any entanglement analysis becomes meaningless; and this Court's careful development of this criterion in Lemon, Tilton and succeeding cases is effectively nullified.

Lemon, Tilton and succeeding cases drew a sharp distinction between aid which by its nature is "religiously neutral" and aid which potentially fosters religion. In programs benefiting church related schools, aid which is religiously neutral is permissible under certain circumstances. Aid which potentially fosters religion is not. The forms of aid considered by the Court in Lemon and Tilton are reviewed below and then compared with the Maryland aid.

1. Lemon v. Kurtzman - teacher salaries

The forms of aid under the two statutes at issue in Lemon were similar. The Rhode Island statute authorized periodic payments directly to teachers in church related elementary schools of a supplement of 15% of their annual salary. 403 U.S. at 607. The Pennsylvania statute authorized periodic reimbursement directly to church related elementary and high schools for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Id. at 606-607.

In analyzing the teacher salary supplements under the Rhode Island statute, the Court first recounted forms of aid which had been upheld in earlier cases:

> "Our decisions from Everson to Allen have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause. We note that the dissenters in Allen seemed chiefly concerned with the

pragmatic difficulties involved in ensuring the truly secular content of the textbooks provided at state expense." Id. at 616-617. (Emphasis added.)

The Court then vividly distinguished these earlier forms of aid from the teacher salary supplements:

> "In Allen the Court refused to make assumptions, on a meager record, about the religious content of the textbooks that the State would be asked to provide. We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education. The conflict of functions inheres in the situation. Id. at 617. (Emphasis added.)

The Court's emphasis on "potential" fostering of religion in the context of teacher salaries is especially

significant in light of three factors. First, the district court had found "that concern for religious values did not inevitably or necessarily intrude into the content of secular subjects...". Id. at 616. However, this Court discounted this finding, and stated that "what has been recounted suggests the potential if not actual hazards of this form of state aid." Id. at 618. (Emphasis added.)

Second, the lower court refused to assume "that parochial school teachers will be unsuccessful in their attempts to segregate their religious beliefs from their secular educational responsibilities." Id. at 619. However, this, too, was discounted, the Court reiterating that "the potential for impermissible fostering of religion is present". Ibid. (Emphasis added.)

Third, aid under both of the challenged statutes was limited to courses whose content inherently protected against the introduction of religious matter. The Rhode Island aid was limited to teachers who taught "only those subjects that are offered in the State's public schools" and who agreed not to teach a course in religion so long as they received salary supplements. Id. at 608. The Pennsylvania statute permitted reimbursement solely to teachers

in mathematics, modern foreign languages (excluding Latin, Hebrew and classical Greek), physical science and physical education. Id. at 610. It excluded reimbursement for "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." Id. at 621. However, such safeguards were insufficient to overcome the "potential" for fostering religion.

In short aid such as bus transportation, school lunches, public health services and secular textbooks is regarded by the Court as religiously neutral without significant potential to foster religion. These forms of aid sharply contrast with teacher salary supplements, because teachers do have the potential for involving faith or morals in secular subjects. The permitted forms contrast even more sharply with the Maryland aid, which may be used for teacher salaries among a wide range of other expenses of church related institutions. See pp. 30-33, infra.

2. Tilton v. Richardson - construction grants

The Lemon distinction between aid which is religiously neutral and aid which potentially fosters religion was explicitly applied to the federal legislation challenged

in Tilton. There one-time, single purpose grants and loans were authorized to institutions of higher education for the construction of academic facilities. 403 U.S. at 675, 688. Such facilities could be used only for "defined secular purposes". Id. at 679. Excluded were facilities used for sectarian instruction, religious worship or primarily in connection with any divinity program. Id. at 675.

The actual facilities at issue in Tilton were secular in nature, including two libraries, a language laboratory, a science building, and a music, drama and arts building. Id. at 681. The evidence showed "that there are no religious symbols and that they had been used solely for nonreligious purposes." Id. at 680.

The Court sharply distinguished the construction grants permitted in Tilton from the teacher salary supplements rejected in Lemon in the following manner:

> "The entanglement between church and state is also lessened here by the nonideological character of the aid that the Government provides. Our cases from Everson to Allen have permitted church-related schools to receive

government aid in the form of secular, neutral, or nonideological services, facilities, or materials that are supplied to all students regardless of the affiliation of the school that they attend. In Lemon and DiCenso, however, the state programs subsidized teachers, either directly or indirectly. Since teachers are not necessarily religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction. There we found the resulting entanglement excessive. Here, on the other hand, the Government provides facilities that are themselves religiously neutral. The risks of Government aid to religion and the corresponding need for surveillance are therefore reduced." Tilton v. Richardson, 403 U.S. at 687-688. (Emphasis added.)

The limited scope of permissible aid to church related schools has been reaffirmed in the following manner:

> "[S]ectarian schools perform secular, educative functions as well as religious functions, and ... some forms of aid may be channelled to the secular .... But the channel

> is a narrow one ...". Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. at 775. (Emphasis added.)

Referring to Tilton, this Court in Nyquist stated that "carefully limited construction grants to colleges and universities could be sustained ...". Id. at 776. (Emphasis added.)

Similarly, in Hunt v. McNair, 413 U.S. 734 (1973), this Court, in upholding a South Carolina program establishing a state "Authority" to raise construction funds from private sources for colleges, noted that the State contributed neither funds nor credit to the program. Id. at 737. The state did not even pay the expenses of the Authority. Id. at 738. Even though no state funds were involved, the private funds raised had use restrictions similar in substance to the Tilton restrictions. See Hunt v. McNair, supra at 736-737. In the absence of evidence to the contrary, the Court assumed that proposed financing related only to a "properly delimited project." Id. at 744.

In short, aid to church related institutions of higher education can be sustained only in the form of secular, neutral or nonideological services, facilities or materials,

such as carefully limited construction grants. It is against this standard that the Maryland aid must be considered.

3. Maryland aid - undefined in scope

The Maryland aid is paid directly to church related and other institutions of higher education. A.52. Each institution determines for itself how its share will be used. R.1582-1583. There are no restrictions as to use of the aid, except use "for sectarian purposes" is proscribed. A.54. This proscription first took effect on July 1, 1972, and was not applicable during the first year that the Act was in force.

The Maryland aid may be used to pay the salaries of teachers, including those of clergy teaching theology. R.1520-1522. A fortiori it may be used to pay the salaries of clergy teaching courses other than theology. In fact a substantial number of clergy do teach courses other than theology. PX 2, pp. 11-21 (R.49); PX 56, pp. 87-91 (R.411); DXM-2, pp. 107-112 (R.735); PX 121, pp. 147-153 (R.1132). It may also be used to pay the salaries of teachers of philosophy taught "in a specifically Catholic context". See DXM-2, p. 77 (R.735); R.1519-1523.

The potential for impermissible fostering of religion is aggravated by the circumstance that at all the appellee institutions the chaplain doubles as a teacher. PX 2, pp. 17, 19 (R.49) (Saint Joseph); R.532 (Notre Dame); DXM-2, pp. 106, 110 (R.735) (Mount Saint Mary's); PX 121, p. 147 (R.1132) (Loyola). This and the other circumstances described above demonstrate that even if the Maryland aid concerned only teacher salaries, it would be far broader than the statutes struck down in Lemon where aid was restricted to secular subjects. In fact aid under the Act has already been used for teacher salaries and related expenses. E.g., JX 44 (R.317); R.1001-1002.

This Court's deeply held misgivings against aid to teachers in church related schools was cogently reasserted in Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472 (1973). In Levitt, the Court held that aid in the form of reimbursement to teachers for merely administering tests in church related schools was an unconstitutional establishment of religion. The payment of state aid to clerics who are teachers strikes directly at the root of the establishment clause:

> "The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property

> aroused their ... [colonial fathers'] ... indignation. It was these feelings which found expression in the First Amendment." Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. at 777, n. 33. (Emphasis added.)

Of course, the Maryland aid is not limited to teacher salaries. It is virtually undefined in scope. For example, there is no restriction in the Act against the use of aid for scholarships, although the scholarship program of at least one appellee is based in part upon religious considerations. See p. 53, infra. Also, there is no restriction against the use of aid for maintenance and repair of buildings or utilities therefor. See pp. 53-55, infra. This absence of restriction prevails although campus buildings sometimes contain chapels, religious symbols and clerics' living quarters, and are used for prayer. A.39-40; PX 21, pp. 104-105 (R.49); R.101, 475, 478, 591-592, 666, 752-753, 841, 898, 1137, 1240; PX 117, ¶21, pp. 18-19 (R.710); PX 146, ¶21, pp. 21-22 (R.1132). In fact aid has already been used for the maintenance and repair of such buildings. JX 44 (R.317); R.665-667.

In short, the Maryland aid is diametrically opposed to the carefully limited, "religiously

neutral" construction grants upheld in Tilton. It is obviously broader than the aid program recently upheld in Hunt v. McNair, supra, which did not involve any payment of state funds to church related institutions and involved even fewer church-state contacts than Tilton. Cf. Cecrle v. Ill. Educ. Facil. Auth., 52 Ill. 2d 312, 288 N.E. 2d 399 (1972); Clayton v. Kervick, 59 N.J. 583, 285 A. 2d 11 (1971). Maryland aid to church related institutions may be used for a virtually unlimited and undefined variety of purposes. As Senior Circuit Judge Bryan noted in dissent below:

> "Of telling decisiveness here is the payment of the grants directly to the colleges unmarked in purpose ....
>
> Presently the Act is simply a blunderbuss discharge of public funds to a church-affiliated or church-related college .... Research discloses to me no comparable carte blanche power of expenditure permissibly conferred by a state upon church-affiliated or church-related institutions." A.29-30.

It is in this context that the resulting relationship between church and state must be considered.

C. Resulting Relationship - Comprehensive and Continuing

1. Duty of state to guarantee that aid not used for religious purposes

In aid programs involving both church related and non-church related institutions, the state must guarantee that the aid does not advance religion. This requirement was expressed in Lemon as follows:

> "The Rhode Island legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion...". 403 U.S. at 619.

In Tilton the absence of such a guarantee was the basis for the Court's invalidating a section of the challenged legislation on its face. 403 U.S. at 682-683. The Court confirmed that the government must ensure against use of aid for religious purposes:

> "...[W]e do perceive an aspect in which the statute's enforcement provisions are inadequate to ensure that the impact of the federal aid will not

> advance religion." 403 U.S. at 682. (Emphasis added.)

Similarly, in Committee for Public Education and Religious Liberty v. Nyquist, supra, the Court held:

> "In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." 413 U.S. at 780. (Emphasis added.)

It is, therefore, clear that effective state guarantees against use of government aid for religious purposes are a sine qua non to the constitutionality of any government aid program involving church related schools.

2. Invalidity of guarantees involving comprehensive and continuing contacts between government and church related institutions

In Lemon, the Court described the restrictions against religious use in the Rhode Island program and their enforcement, as follows:

> "To ensure that no trespass occurs, the State has therefore

carefully conditioned its aid with pervasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools and use only those texts and materials that are found in the public schools. In addition the teacher must not engage in teaching any course in religion.

> A comprehensive discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church." 403 U.S. at 619. (Emphasis added.)

Beyond the required surveillance the Rhode Island statute required the state under certain circumstances to examine the school's records to ascertain how much of its total expenditures were attributable to secular vis a vis religious activity./3 The Court held:

/3 The district court found only
*[footnote cont. next page]

> "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids .... [W]e cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses." Id. at 620. (Emphasis added.)

Similarly, the Pennsylvania statute considered in Lemon was invalidated, because "the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state". Id. at 620-621. Moreover, Pennsylvania required recipient schools to maintain accounting procedures sufficient to identify the cost of secular educational services. Id. at 609-610. These accounts were subject to state audit. Id. at 610. The Court held that this power "to inspect and evaluate a church related school's financial records and to determine which expenditures are religious and which are secular creates an

/3* one instance where such an examination was necessary and found it unlikely that such determinations would be generally necessary. 403 U.S. at 608, n. 2.

intimate and continuing relationship between church and state." Id. at 621-622; accord; Johnson v. Sanders, 319 F. Supp. 421 (D. Conn. 1970), aff'd 403 U.S. 955 (1971).

The Tilton statute escaped invalidation, because the character of the institutions and the nature of the aid resulted in a minimal relationship between church and state. The Court stressed:

> "[U]nlike the direct and continuing payments under the Pennsylvania program, and all the incidents of regulation and surveillance, the Government aid here is a one-time, single-purpose construction grant. There are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities. Inspection as to use is a minimal contact." 403 U.S. at 688. (Emphasis added.)

In short, aid to church related institutions may be upheld if the resulting relationship involves only minimal rather than comprehensive contacts, and does not involve continuing regulation or surveillance, continuing financial relationships or dependencies, continuing audits or the possibility thereof, or continuing government analysis

of an institution's expenditures on secular as opposed to religious activities. With this in mind, enforcement under the Maryland legislation is considered.

3. Comprehensive and continuing church-state contacts under the Maryland aid program

The enforcement and administration of the challenged legislation necessarily involve a comprehensive and continuing relationship between church related institutions and the State of Maryland.

The Act itself calls for direct and continuing payments to the institutions on an annual basis. A.52. The State continuously regulates the church related institutions by requiring on an annual basis (i) prior verification that aid will not be used for sectarian purposes, and (ii) post receipt verification that aid has not been so used, including necessary "follow up" by the State. A.48; See R.1532-1533.

The State analyzes the institutions' use of aid on an annual basis to determine whether such use was secular or sectarian. A.48. These analyses are based upon a usage description furnished by the institutions. Ibid. Also, the institutions are subject to annual audit. Ibid.

The foregoing alone constitute

precisely the continuing regulation, financial dependencies, audits and governmental analysis of expenditures of church related institutions which this Court has rejected. Lemon v. Kurtzman, supra; see Tilton v. Richardson, 403 U.S. at 688. However, the Maryland program suffers from even greater defects.

The State collects a wide variety of information annually from church related and other institutions receiving aid under the Act. The information is collected through a series of reports furnished by the institutions. The report forms call for the institutions to furnish a wide range of details including the following: degree program names; levels of degrees or awards and taxonomy codes; numbers of part-time and full-time students in each year in each major; description of the institutions; current funds, revenues and expenditures; indebtedness on physical plant, and endowment by book and market value; library collection, staff, operating expenditures and physical facilities; advanced degree students; degrees awarded; and inventory of physical facilities, including breakdowns based upon square footage and types of rooms (classrooms, office, laboratories, etc.). R.1529-1530, 1567, 1574-1576; PX 9, 10, 11 and 12 (R.49).

Although the foregoing information

would be collected even if there were no aid program, the information is used or available for use in connection with the administration of the Act. See R.1526-1527, 1529-1531, 1572-1576. For example, information as to theological degrees awarded may be used to ascertain whether an institution has requested aid based upon any such degrees. R.1572-1576. Information as to admissions criteria may be used to ascertain whether any religious criteria are included. R.1576. Also, the comprehensive information generally would reflect a change in emphasis of an institution as to programs and the use of physical facilities. R.1526-1527, 1529-1531. Such church-state contacts are entangling and proscribed.

There are further defects. In order for the State to effectively guarantee that teachers refrain from fostering religion in class, comprehensive surveillance would be required. Tilton v. Richardson, 403 U.S. at 687-688. In order for the State to ascertain that aid used for building maintenance and repair excludes the maintenance and repair of chapels, religious symbols and clerics' living quarters, detailed accounting restrictions and audits would be required. See pp. 53-55, infra. And in order for the State to ascertain that aid used for scholarships was not ultimately used for religious purposes, the State would have to

impose additional accounting and audit controls. See pp. 51-53, infra.

The majority below concluded that the church-state relationship under the Maryland aid program is not entangling. A.17. In so concluding, the majority below relied upon Hunt v. McNair, and stated that the church-state relationship there was far more pervasive than any likely to result from the challenged legislation. A.20-21. This view fails to recognize the South Carolina Supreme Court's "narrow interpretation of the practical operation" of the powers which may have given rise to entanglement. Hunt v. McNair, 413 U.S. at 748. Moreover, no public payments whatsoever were made to aid recipients in Hunt (Id. at 737);and, therefore, enforcement required only minimal church-state contact. Also, the powers in Hunt which may have given rise to entanglement were catalyzed only in the event of default by a recipient institution, and in such event a foreclosure proceeding which did not involve entanglement could be employed. Id. at 748-749. Therefore, the majority's reliance upon the Hunt program to uphold the Maryland program was misplaced.

As demonstrated above in no sense does the challenged legislation represent the type of narrow and limited relationship between church and state upheld in Tilton or Hunt. The relationship here is at least as entangling as that rejected in Lemon. At the least

the potential for entanglement is real and inescapable. As Judge Bryan stated in his dissent below:

> "Potentiality is also an assaying factor in measuring whether the Act's play within the colleges creates 'an excessive government entanglement with religion' .... Instantly the possibility is real and manifold. This is attributable to the complete absence of any appointment of the objects of the Act's bounty when extended to church-affiliated or church-related entities. In this context, to be assured that none of the public funds kindle or fire religion and theology, a closer oversight is required of the appropriation and application of the grants than in secular schools. Thus unavoidably the State is drawn into frequent and constant touch with the fiscal affairs of each college." A.32-33. (Emphasis added.)

D. The Tilton Entanglement Perspective Summarized

In its entanglement analysis in Tilton, the Court distinguished Lemon, because "three factors substantially diminish the extent and the potential danger of the entanglement." 403 U.S. at 685. First, religious indoctrination was not a substantial purpose or activity of the defendant schools.

Id. at 687. Second, the aid provided for "facilities that are themselves religiously neutral." Id. at 688. Third, the aid was "a one-time,single purpose construction grant ... [with] ... no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities." Ibid.

The Court viewed as significant the cumulative impact of the foregoing factors, as opposed to any one factor:

> "No one of these three factors standing alone is necessarily controlling; cumulatively all of them shape a narrow and limited relationship with government which involves fewer and less significant contacts than the two state schemes before us in Lemon and DiCenso. The relationship therefore has less potential for realizing the substantive evils against which the Religion Clauses were intended to protect.
>
> We think that cumulatively these three factors also substantially lessen the potential for divisive religious fragmentation in the political arena." Ibid. (Emphasis added.)

Conspicuously absent from the Maryland aid program are at least two of the three factors which reduced the potential for both administrative and political entanglement in Tilton. First, the Maryland aid is in no way restricted to provide "facilities that are themselves religiously neutral." Aid assumes the form of direct payment of funds for a virtually unlimited variety of purposes. See pp. 30-33, supra.

Second, the Maryland aid is by no means "a one-time, single purpose construction grant". On the contrary, there are continuing financial relationships, because aid is distributed annually. Also, there are continuing governmental financial analyses of expenditures on secular as opposed to religious purposes. See pp. 39-43, supra.

In addition to actual or potential administrative entanglement, the absence of the two factors above has already led to "the potential for divisive religious fragmentation in the political arena." See Tilton v. Richardson, 403 U.S. at 688. Although this "is admittedly difficult to document," Ibid., at least one college president, who is a Jesuit priest, has already advocated aid to private colleges "in the political arena". SDX-4, p. 2 (R.1546).

At least one state court has warned against the dangers of political entanglement arising out of a college tuition supplement program far more limited in scope than the Maryland program. With all nine justices concurring, the Washington Supreme Court stated:

> "However, political entanglement is intrinsic in this program. Unlike the one-time, single purpose construction grants permitted in Tilton, the unrestricted monetary grants in the instant case are likely to result in a continuing financial dependency by the recipient schools upon the state. Greater and greater appropriations are likely to be demanded as costs increase each year, thus splitting the candidates and the electorate along religious lines." Weiss v. Bruno, 82 Wash. 2d 199, 230-1, 509 P. 2d 973 991 (1973) (dictum). (Emphasis added.)

The third factor, i.e. the absence of "religious indoctrination" as a substantial activity or purpose, is less clear here. The lower court found that religious indoctrination is not a substantial purpose or activity at the defendant colleges. A.42. However, the evidence plainly demonstrates that the advancement of religion, if not religious indoctrination, is a substantial

activity or purpose at each institution. See pp. 19-22, supra and 74-75, infra.

This is supported by the trial court's finding that all of the defendant institutions have a "secondary objective of fostering religious experience." A.46. This secondary objective, together with the substantial religious purpose and activity of the institutions, mandates intensive government surveillance with resulting entanglement between government and religion. Therefore, even the third factor which reduced the potential for entanglement in Tilton is absent from this case.

In order to uphold the Maryland aid program, this Court must effectively erode the importance of at least two of the factors relied upon by the plurality in Tilton in concluding that the potential for entanglement was reduced, the two factors being "religiously neutral facilities" and a "one-time, single purpose" grant. More basically, the broad and undefined nature of the Maryland aid bears no resemblance to the limited form of aid upheld in Tilton and is even broader than the aid struck down in Lemon. Upholding the Maryland program would seriously undermine this Court's persistent emphasis on nature of the aid as a critical

factor in determining whether there is excessive entanglement between church and state. For if a program as broad as Maryland's is valid, then the nature of the aid becomes meaningless as a criterion to decide any entanglement question.

Tilton concludes that an aid program involving both church and non-church related institutions must be limited in scope and avoid continuing and comprehensive church-state relationships, whether actual or potential. The Maryland program fails in both respects. This failure is aggravated by the substantial religious activity and purpose of the appellee institutions. Therefore, the challenged legislation is unconstitutional.

II. THE PRIMARY EFFECT OF THE MARYLAND AID PROGRAM IS TO ADVANCE RELIGION.

In order to survive this establishment clause challenge, the primary effect of the Maryland aid program must neither advance nor inhibit religion. Lemon v. Kurtzman, 403 U.S. at 612. The primary effect test has been explained as follows:

> "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive

> that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." Hunt v. McNair, 413 U.S. at 743.

The term "primary effect" applies to state aid which only potentially or partially advances religion. The Court has explained:

> "Any remaining question about the contours of the 'effect' criterion were resolved by the Court's decision in Tilton, in which the Court found the mere possibility that a federally-financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might 'in part have the effect of advancing religion'." Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. at 783, n. 39. (Emphasis added.)

The Maryland aid program has the "primary effect" of advancing religion in the following ways:

A. By its failure to guarantee that state aid will not be used to advance religion.

B. By its financial support of classes in which prayer is recited.

C. By its financial support of institutions which impose religious restrictions on faculty appointments and perpetuate de facto religious restrictions on student admissions.

D. By its financial support of institutions whose secondary objective is to encourage spiritual development and which require students to take a limited range of courses in theology and doctrine taught primarily or exclusively by clerics of the affiliated church.

E. By its financial support of sectarian institutions.

A. Failure To Guarantee That State Aid Will Not Be Used To Advance Religion

As discussed at pages 34-35, supra, the State has the duty to effectively guarantee that aid does not advance religion; and failure to do so invalidates the aid program. Notwithstanding the entangling relationship described at pages 39-43, supra, the Maryland aid program fails to guarantee that aid will not advance religion, at least in the following respects.

1. Teacher salaries

The Act does not proscribe

use of aid to pay teachers' salaries. A.52-55; see pp. 30-32, supra. Even if informed that aid were used to pay salaries of clergymen teaching theology, the State would not inquire as to the subject matter of the courses or the teachers' handling thereof. R.1519-1523. Nor would there be any State inquiry as to other courses whose teachers (clergy and non clergy) were financially supported by the State. Ibid. This absence of review plainly violates Tilton's mandate that "[s]ince teachers are not necessarily religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction." 403 U.S. at 687-688.

2. Scholarships

The Act does not proscribe use of aid for scholarships. A.52-55. In fact, at least one defendant (Loyola College) has already used aid for this purpose. R.1478-1480. In administering the Act the State does not even inquire whether state aid used for scholarships is thereafter confined to secular purposes. R.1518-1519. Therefore, upon crediting students' tuition in the amount of their scholarships, schools are free to use funds without restriction.

Use of Maryland aid for scholarships

without ensuing use restrictions is basically the same as three separate aid programs on the pre-college level struck down by this Court. In Committee for Public Education and Religious Liberty v. Nyquist, supra, New York State authorized tuition reimbursement and tax benefits to the parents of nonpublic school children. 413 U.S. at 764. However, there was no effort to ensure that upon receipt by the schools the aid supported only secular functions. Id. at 783. Likewise, there is no effort to ensure that the Maryland aid, when ultimately received by the schools, is confined to secular purposes. The primary effect of the aid in Nyquist was to advance religion, and the program was unconstitutional. Id. at 780-785. The same result is warranted here.

It is noteworthy that in Nyquist, the state argued that the aid went to parents and not schools. Id. at 785-787, However, the funneling of funds indirectly to nonpublic schools through parents was held constitutionally insignificant. Ibid.; Id. at 786, n.40. Similar aid programs in Pennsylvania and Ohio were rejected in Sloan v. Lemon, 413 U.S. 825 (1973), and Wolman v. Essex, 409 U.S. 808 (1972), affirming Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio E.D. 1972).

Tilton clearly supports such a result. In Tilton the Court struck down that part of the aid

program which would have permitted the future unrestricted use of facilities at the end of twenty years. Id. at 683-684. A fortiori the present unrestricted use of scholarship funds by church related institutions violates the establishment clause.

There is a further defect in use of the Maryland aid for scholarships. At least one appellee (Notre Dame) maintains a scholarship program entitling any member of the sponsoring religious order and any Catholic parochial school teacher to scholarships in the form of tuition discounts. R. 413, 437, 524-525. By permitting aid to be used for scholarships without inquiry as to the nature of the scholarship program, the State permits perpetuation of a scholarship program based upon religious considerations. In this manner also the State fails to guarantee that aid is restricted to secular purposes.

3. Building maintenance and repair

The Act does not restrict aid used for the maintenance of buildings to buildings used exclusively for secular purposes. A.52-55. It is doubtful whether such restrictions could be enforced in the context of the appellee institutions because of their substantial religious

activities and purposes. Cf. Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. at 774. In any event the absence of restrictions on building maintenance here renders the Maryland aid program just as invalid as the New York precollege maintenance and repair program rejected in Nyquist. There the court emphasized:

> "No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions. Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salary of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities. Absent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools." Ibid. (Emphasis added.)

Similarly, no attempt under the Maryland program is made to restrict payments

to "facilities used exclusively for secular purposes".

Uncontradicted evidence demonstrates the widespread use of campus buildings for religious purposes, including prayer (A.39), religious services (A.44), religious symbols such as crucifixes (A.40) (PX 21, pp. 104-105; R.49) (R.478) (PX 117, ¶21, pp. 18-19; R.710) (PX 146, ¶21, pp. 21-22; R.1132), religious counseling (PX 23, pp. 1, 4, 6; R.49) (PX 114; R.710) (R.1240-1241), and other religious activities. E.g., (PX 1, p. 17; R.49) (R.752-753, 832-833) (PX 146, ¶20, pp. 19-21, R.1132). See pp. 69-74, infra. By comingling aid with general college operating funds, two appellees have already used aid for building maintenance and repair. See JX 44 (R.317); R.665-667; A.50.

"If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair." Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. at 777. Because the challenged legislation permits maintenance and repair of buildings used for religious purposes, its primary effect is to advance religion.

4. Overall ineffectiveness of guarantees

Administration of the Act by

the State through trial vividly demonstrates the ineffectiveness of its guarantees. As of the time of trial no specific guidelines had been issued by the State as to use of aid. R.1504-1509. As of the time of trial, the State had made no effort to ascertain how funds already paid to the appellee institutions had been used. R.1501. Although the State requires recipient institutions to adopt internal accounting and administrative procedures to control the use of aid, it fails to attempt any review of the adequacy of such procedures. R.1510-1511.

Even the audit available to the State is ineffective. The lower court, apparently in an effort to find such audit not entangling, held it to be "quick and non-judgmental." A.48. If "non-judgmental" it is difficult to see how an auditor could "judge" whether an expenditure was for secular purposes. Yet if the auditor does make such judgment, the church-state entanglement is evident. Lemon v. Kurtzman, 403 U.S. at 620; Tilton v. Richardson, 403 U.S. at 688.

Moreover, there are no reviews of class schedules or course descriptions to guard against sectarian use. As stated at page 51, supra, even if informed that aid were to be used to pay clergymen teaching theology the State would fail to inquire as to the course subject matter

or the teacher's handling thereof. Nor would there by any inquiry as to the handling of other courses. R.1519-1523.

The absence of such review here contrasts sharply with the on-site inspections in Tilton to enforce the statutory restrictions. 403 U.S. at 675. Such inspections included analyses of class schedules and course descriptions to ascertain that no sectarian instruction would be offered in federally supported areas. 403 U.S. at 650 (Brennan, J., dissenting).

The foregoing further demonstrates the absence of effective guarantees against religious use, which invalidates the Act as a law respecting the establishment of religion.

B. Financial Support of Classes In Which Prayer Is Regularly Recited

Plaintiffs submit that the financial support of class programs in which prayer is regularly recited is an unconstitutional establishment of religion.

1. Classroom prayer at appellee institutions

The lower court found that "there is a practice at ... [four] ... of the defendants of starting classes with prayer." A.39. The

extent of prayer ranges from approximately 6% at Mount Saint Mary's College (Pl. Ex. 117B; R.710) to a majority at St. Joseph College. A.40. The recitation of prayer is treated as a facet of each instructor's academic freedom. A.39. There is no effort by the State to prohibit classroom prayer or to condition aid to teachers upon such a prohibition. See A.52-55; R.1519-1523.

The religiosity of classes in which prayer is recited is often augmented by the presence of religious symbols and clerics in religious garb as teachers. See A.40. Prayer is recited in a wide variety of classes. These include education, language, mathematics, physical and social science, and theology. PX 20 (R.49); PX 73B (R.411); PX 117B, ¶¶ 2 & 3, pp. 13-16 (R.710); PX 148, ¶¶ 2-5, pp. 29-39 (R.1132).

2. Prayer and religious instruction excluded from public schools

The concept that public schools may not be constitutionally used for state sponsored prayer is beyond dispute. Engel v. Vitale, 370 U.S. 421 (1962). In Engel, a state sponsored prayer in public schools was challenged. The prayer was denominationally neutral.[4] As construed by the state courts, no pupil could be compelled to join

[4] "Almighty God, we acknowledge our dependence upon thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." 370 U.S. at 422.

in the prayer under the authorizing statute. Id. at 423-424. In unequivocally rejecting the statute's constitutionality, this Court stated:

> "The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say.... Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause ...". Id. at 429-430. (Emphasis added.)

This theme was reiterated one year later in Abington School District v. Schempp, 374 U.S. 203 (1963). In striking down bible reading and prayer in the public schools, the Court reaffirmed:

> "Our constitutional policy...does not deny the value or the necessity for religious training, teaching or observance.... But... it does deny that the state can undertake or sustain them in any form or degree." Id. at 218-219. (Emphasis added.)

The Court reiterated that the absence of compulsion upon students to join in prayer offered no defense to the charge of unconstitutionality under the Establishment Clause. Id. at 224-225; Committee For Public Education and Religious Liberty v. Nyquist, 413 U.S. at 786.

In reply to the argument that the religious exercises were minor in nature, the Court in Schempp stated:

> "Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'" 374 U.S. at 225. (Emphasis added.)

The de minimis nature of classroom prayer was also urged upon the court in De Spain v. DeKalb County Community School District, 384 F. 2d 836 (7th Cir. 1967), cert. den. 390 U.S. 906 (1968). The Court agreed that the prayer was de minimis, but refused to uphold the practice in the classroom lest the "trickling stream ... become a raging torrent." Id. at 840.

Engel and Schempp involved direct state "sponsorship" of prayer and bible reading by teachers paid with state funds. In Illinois ex rel McCollum v. Board of Education, 333 U.S. 203 (1948), the Court disapproved the mere use of public school classrooms by clergy for religious instruction on a voluntary basis. Cf. Zorach v. Clauson, 343 U.S. 306, 309, 315 (1952).

Engel, Schempp and McCollum, read together, mean that there may be neither state sponsored prayer nor religious instruction, whether or not state sponsored, in the public schools. Nor may the state permit such activity in its public colleges. See Epperson v. Arkansas, 393 U.S. 97, 106-107 (1968); Williams v. Eaton, 468 F. 2d 1079, 1083 (10th Cir. 1972).

3. Prayer and religious instruction excluded from publicly financed facilities or programs

Since the state may not sponsor prayer or permit religious instruction, whether or not state sponsored, in public colleges, it follows that the state may not finance prayer or religious instruction in private colleges. This was vividly demonstrated in Tilton. The statute challenged there expressly prohibited the use of federally aided facilities for religious

instruction, training or worship. 403 U.S. at 679-680. However, a limited enforcement period of twenty years would have opened the facility to such uses after the expiration of twenty years. Id. at 682.

Because the facility might be "used to promote religious interests" twenty years hence, the Court struck down the twenty year limitation period. Id. at 683. In short, the Court ruled that there may be no religious instruction, training or worship in publicly financed facilities at any time. Likewise, we submit, there may be no religious instruction, training or worship in publicly financed programs such as Maryland's.

Aid for classroom instruction is undeniably part of the Maryland program. R.1519-1523; see R.1582-1583; A.52-55. Since there is a practice of prayer in the classroom, the State, in effect, is financing religious worship. This is an establishment of religion. Although the trial judge found prayer to be "peripheral", A.40, the de minimis nature of any prayer is irrelevant under Schempp and DeSpain. See p. 60, supra. Even nondenominational prayers may not be sponsored by the state. Engel v. Vitale, supra.

The classroom prayer recitation here is aggravated by the strong

encouragement, if not requirement, of at least two appellees that students attend class. See PX 9, p. 23 (and supplement) (R.49); PX 63, p. 7 (R.411); cf. Anderson v. Laird, 466 F. 2d 283 (D.C. Cir. 1972) cert. den. 409 U.S. 1076 (1972) (military academies' requirement of chapel attendance unconstitutional). Because Maryland finances programs which include a practice of prayer, its aid program is a law respecting the establishment of religion.

C. Financial Support of Institutions Which Impose Religious Restrictions On Faculty Appointments And Perpetuate De Facto Religious Restrictions On Student Admissions

In Tilton the Court left open whether colleges' imposing religious restrictions on admissions would be eligible for aid. 403 U.S. at 682. The Tilton appellants had offered a profile of the typical sectarian institution of higher education, claiming that such an institution (i) imposed religious restrictions on admissions, (ii) required attendance at religious activities, (iii) compelled obedience to doctrines and dogmas of the faith, (iv) required instruction in theology and doctrine, and (v) did everything it could to propagate a particular religion. Ibid. The Court replied:

> "But appellants do not contend that these four institutions fall within this category. Individual

projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics." Ibid.

Appellants submit that aid to an institution having any one of "these characteristics" is unconstitutional. Any other conclusion would permit obviously unacceptable results. For example, if all five characteristics had to be shown to invalidate a public aid program, an institution would be permitted to do everything possible to propagate a given religion, and still be entitled to receive aid as long as it did not have the other characteristics. Giving aid to an institution that did all it could to propagate a given religion would obviously offend the establishment clause. See Hunt v. McNair, 413 U.S. at 743.

The evidence in this case shows that at least three of these characteristics are present in varying degrees in the appellee institutions. Restrictions on faculty appointments and student admissions are discussed in this part "C". The requirement of theology and doctrine is discussed in "D" beginning at page 69, infra.

1. Religious restrictions on faculty appointments

Three appellees have the policy

or practice of at least partially restricting faculty appointments based on religion in the sense that they favor the hiring of some faculty upon a consideration of religion. Saint Joseph College regards it as a "first obligation" to have Catholic theology teachers; and all theology teachers have been Catholic for several years. PX 28, ¶12 (R.49); PX 21, pp. 71-72 (R.49). Also, the lower court found that budgetary considerations lead this college to favor the hiring of members of the sponsoring religious order in areas other than theology. See A.40-41.

The College of Notre Dame believes that Catholics are the most qualified to teach theology "in the Catholic tradition of Christianity". PX 72, ¶12, p. 10 (R.411). In fact all theology teachers are Catholic (two clergymen, two members of the sponsoring religious order and one layman). R.532-533. Also, the lower court found that budgetary considerations lead this college to favor the hiring of members of the sponsoring religious order in areas other than theology. See A.40-41.

At the time of trial, Loyola College had an affirmative policy of increasing the Jesuit presence on campus from eleven to twenty over a five year period. R.1219-1220. Also, this college was establishing a vigorous recruiting campaign designed to attract two Sisters of Mercy, a sponsoring religious order, to the

faculty each year. A.41; R.1228-1229. In recruiting faculty for its theology department, Loyola College looks first for Jesuit priests and Sisters of Mercy, and then to Roman Catholic laymen. PX 146, ¶12, pp. 9-11 (R.1132); R.1235, 1319. Also, the college attempts to maintain at least two Jesuits as faculty in the philosophy department. R.1406, 1408.

The foregoing demonstrates that at three appellee institutions a policy or practice of faculty appointments based in part on religion are in effect. To the extent that these appellees have a policy or practice favoring the hiring of faculty of one religious preference, they have the corollary policy or practice of restricting the hiring of faculty of other religious preferences. By permitting aid to such institutions, the Act is a law respecting the establishment of religion.

2. Perpetuation of de facto religious restrictions on student admissions

Four appellees have de facto religious restrictions on the admission of students, because their recruiting efforts are concentrated toward members of a particular religious faith. Although the trial court found that students are admitted without regard to religion (A.44), we submit that there exists a practice of concentrating recruiting efforts largely toward students of one faith, thereby perpetuating a religiously homogeneous student body.

Saint Joseph College has directed approximately fifty percent of its recruiting efforts toward Catholic high school students; and a large majority of the college's students graduated from Catholic parochial schools. R.157; PX 21, pp. 94-97 (R.49). Publications distributed to prospective students state that the college is Catholic and display religious symbols. E.g., PX 1, pp. 4-7, 15, 20, 44, 78 (R.49); PX 6, cover page (R.49). Application forms request the applicant's religious preference. PX 8 (R.49).

During the 1972-73 school year, the College of Notre Dame directed approximately one-third of its recruiting efforts toward Catholic high schools, and the balance toward public schools. R. 575, 586-587. Half or more entering freshmen in the 1971-72 and 1972-73 school years graduated from Catholic high schools. R.581-583. School Sisters and parochial school teachers who are admitted as students receive tuition discounts of 40%. R.436-437; 524-525.

More than half of the high schools at which Mount Saint Mary's College has recently recruited are Catholic parochial schools, and more than half of the high schools on the college's "selected mailing list" are Catholic parochial schools. R.1021-1022, 1027-1029. At the time of trial, the current recruiting brochure described the college as "the second oldest independent Catholic college in the country". PX 109, p. 4 (R.710); R. 1029. It

states "that education is enhanced by the Mount's Catholicism" and that the presence of priests is "felt and valued in every aspect of life at Mount Saint Mary's". PX 109, p. 4 (R.710). Prior recruiting brochures had similarly religious overtones. E.g., PX 92 and 93 (R.710). In recruiting students for 1972, each issue of "Briefing" a college information bulletin, was sent to the pastors of all Catholic churches in the dioceses of Baltimore, Washington and Harrisburg. PX 101, p. 7 (R.710).

The major "feeder" schools for Loyola College are Catholic high schools in the Baltimore metropolitan area; and the college continues to recruit at such schools. R.1296, 1323-1325. Loyola's reputation as a Catholic college, "which we are happy to recognize and admit ...", also draws Catholic applicants. R.1203-1204.

Moreover, as the trial court found, "for each defendant the religious affiliation of the college would be readily apparent to any prospective applicant who took the time to read the catalogue." A.43. The great majority of students at the appellee institutions are Catholic. A.44.

We submit that by perpetuating the predominance of one religious group through recruiting efforts directed in large part at a population comprised of that group, the above four institutions impose de facto restrictions on student

admissions. Analogous though distinguishable employment recruiting practices have been held unlawful under civil rights laws. E.g., United States v. Dillon Supply Company, 429 F. 2d 800, 803-804 (4th Cir. 1970); United States v. Georgia Power Company, 474 F. 2d 906, 911, 925 (5th Cir. 1973). Payment of state aid to institutions imposing de facto religious restrictions on student admissions is an establishment of religion, and should be enjoined. See Tilton v. Richardson, 403 U.S. at 682.

D. Financial Support of Institutions Whose Secondary Purpose is to Encourage Spiritual Development and Which Require Students to Take a Limited Range of Courses in Theology and Doctrine Taught Primarily or Exclusively by Clerics of the Affiliated Church

In Tilton the Court left open whether institutions which required instruction in theology and doctrine, at least where there is a danger of religious overtones, disqualified them from receiving aid. 403 U.S. at 682. As stated earlier this characteristic alone should be sufficient to bar an institution from the public treasury. See pp. 63-64, supra.

The appellee institutions all require students to take theology. A.45-46. At Saint Joseph College and Loyola College this requirement extends only to Catholic students.

PX 28, p. 21 (R.49); PX 146, p. 32 (R.1132). At College of Notre Dame and Mount Saint Mary's College, all students are required to take theology. R.453; DXM-2, pp. 41-42 (R.735). In addition, Mount Saint Mary's College requires all students to take nine hours of philosophy. Ibid.; see pp. 72-73, infra.

The lower court found that "the study of religion or theology may become an instrument for strengthening the students' religious life." A.49. This finding is based upon the schools' offering only a limited array of theology or religion courses, the staffing of departments primarily or exclusively with clerics, and the appellee institutions' "secondary objective of fostering religious experience." A.41, 42, 46. Moreover, the evidence fully supports the conclusion that theology courses at the above four institutions are at least in part permeated with religious as opposed to academic overtones, and are in fact an instrument for strengthening the students' religious life.

At Saint Joseph College the inculcation of religion is a goal of at least some theology courses. The chairman of this college's theology department testified that "our goal in the Theology Department would be to deepen their appreciation of Divine Revelation ...". PX 22, pp. 4-5 (R.49). Revelation holds "that God intervened in human history to save mankind in 1850 B.C.

We all practically hold that." PX 22, p. 6 (R.49). Similarly, the president of Saint Joseph College testified that "certainly in theology" students are made aware of the Fatherhood of God. PX 21, p. 15 (R.49); R.99. This is a belief in "a Supreme Being, who we call Father, who guides our destinies and in whom we put our trust". R.98.

One basic theology course offered at Saint Jospeh College is "just understanding of God or concept of God, our concept and the redemption of mankind by his Divine Son, and it's primarily the doctrine of God and of his Divine Son, the Holy Spirit, Blessed Trinity, principally that." PX 22, pp. 6-7 (R.49). Another basic theology course includes "the study of the Church and the study of the Sacraments principally. The Church is the continuation of Christ and the Sacraments of his redemptive activities." PX 22, p. 10 (R.49).

The foregoing clearly demonstrates that at Saint Joseph College, the purpose of at least the basic theology courses is religious, not academic; the course content is religious, not academic; and the courses are used to strengthen religious beliefs.

The president of College of Notre Dame testified that theology courses "deal with knowledge of eternal truths." PX 71A, p. 25 (R.411). For some people the concept of Christ as a divinity

would be an eternal truth. PX 71A, p. 26 (R.411). This would be taught "in some theology courses specifically aimed to teach the tenets of Catholicism." Ibid. The foregoing demonstrates that, at least in part, theology courses at Notre Dame have religious as contrasted with academic overtones.

The chairman of the theology department at Mount Saint Mary's College testified that in no case to his knowledge had any theology teacher taken a personal position contrary to the Roman Catholic Church. R.1058. This is hardly surprising, since, as the lower court found, all theology teachers are Roman Catholic priests. A.42. The absence of diverse opinions generated through such a homogeneous staff makes it probable that the study of religion or theology is an instrument for strengthening the students' religious life. See A.49.

Philosophy at Mount Saint Mary's College, of which nine hours are required of all students, also has deeply religious overtones. It is intended to provide the intellectual foundation for the student's effort to integrate the diverse contents of his liberal arts studies, and is pursued "in a specifically Catholic context .... first, as a body of questions directly related to man's religious experience; second, as a body of ideas characteristic of the intellectual and moral traditions of Catholicism." DXM-2, p. 77 (R.735); R.848-850. (Emphasis added.) The foregoing demonstrates that at Mount Saint Mary's College there is a cogent

probability that both theology and philosophy are used to strengthen students' religious beliefs.

The chairman of the theology department at Loyola College testified that there is no substantial difference between teaching religion to precollege students vis a vis college students. He stated:

> "... [I]n the teaching of Religion, let's say in the elementary school, already, and in high schools, there should be the same method as in the teaching of Theology, only on a lower level -- adapted to the pupils." R.1370.

On both the college and precollege levels, the purpose is to guide the student to a free decision, recognizing that Catholic theology is convinced that it is in conformity with "Holy Scripture". R.1373. Theology concerns itself with Man's "ultimate concern", described as follows:

> "According to me, that is being united with God and Jesus Christ, and Jesus Christ is God Man, so that it is human, human, human! That is my ultimate concern. Be a human being!" R.1381.

The probability that theology teachers will inculcate religion in courses addressed to man's "ultimate concern" is evident.

The requirement of theology is a characteristic which expressly concerned the Court in Tilton. 403 U.S. at 682. This requirement, especially in the deeply religious settings manifested in the theology departments of the appellee institutions, disqualifies them from receiving public funds.

E. Financial Support of Sectarian Institutions

This Court has suggested that an institution is "sectarian" when "religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission ...". Hunt v. McNair, 413 U.S. at 743. Although the term "sectarian" is a convenient epithet, the fundamental question in deciding whether an institution is sectarian is what criteria should be applied. Tilton, Lemon and certain state court cases offer substantial guidance.

Five of the relevant Tilton criteria are stated at page 63, supra. Also relevant under Tilton is whether "the inculcation of religious values ... [is] ... a substantial if not the dominant purpose of the institutions." 403 U.S. at 685. The relevant Lemon criteria are stated at page 18, supra.

In Horace Mann League v. Board of Public Works, 242 Md. 645, 672, cert denied, 385 U.S. 97 (1966), the Maryland Court of Appeals set forth six general criteria relevant in determining sectarianism: (i) the stated purposes of the college; (ii) the religious affiliations of the college personnel; (iii) the college's relationship with religious organizations and groups; (iv) the place of religion in the overall college program; (v) the result or outcome of the college program; and (vi) the work and image of the college in the community. These criteria have generally been used in at least two state cases following Horace Mann. See Weiss v. Bruno, 82 Wash. 2d 199, 509 P. 2d 973 (1973); State ex rel Warren v. Reuter, 44 Wis. 2d 201, 170 N.W. 2d 790 (1969).

Contrary to the lower court's finding that the appellee institutions are not "pervasively sectarian" (A.38), appellants submit that by applying the Tilton, Lemon and other criteria set forth above to the evidence in this case, the conclusion is warranted that all of them are sectarian. The facts relied upon for this contention are detailed in this brief, the "Appendix To Plaintiffs' Brief" filed below (Rec. 1473) and plaintiffs' proposed findings of fact (Rec. 961-1011).

III. IF THE CHALLENGED LEGISLATION IS UNCONSTITUTIONAL THE APPELLEE INSTITUTIONS SHOULD BE REQUIRED TO REFUND ALL PAYMENTS NOT ENJOINED UPON MOTIONS OR APPLICATION TIMELY FILED BY APPELLANTS.

As stated earlier most of the challenged aid for the appellees was

placed into an escrow account pending the litigation and judgment below. See p. 5, supra. When the State of Maryland expressed its intention to release funds computed with reference to graduate degrees, plaintiffs moved for a preliminary injunction, but the motion was denied. Ibid. Following judgment a motion and application for injunction against payment pending appeal were respectively filed with the lower court and this Court, and both were denied.

Appellants contend that if the Act is held unconstitutional, the appellee institutions should be required to refund all payments not enjoined upon timely filed motions or application. A similar issue was considered by the Court in Lemon v. Kurtzman (Lemon II),411 U.S. 192 (1973). Lemon II was the sequel to this Court's ruling in Lemon v. Kurtzman in 1971, invalidating Pennsylvania's aid program for private elementary and secondary schools. Prior to this Court's 1971 decision, Pennsylvania schools had performed services pursuant to the challenged legislation, but had not been paid for these services as of the time of this Court's ruling. The issue in Lemon II was whether such payment should be enjoined. This Court, by a 5-3 vote,with Justice Marshall not taking part, declined to enjoin payment.

In reaching this result the plurality stated that flexibility was needed in "adjusting and reconciling public and private needs." Id. at 198-200.

A number of factors were considered. First the appellants had abandoned their request for preliminary injunction. Id. at 196. Also, they had not moved for interlocutory relief pending appeal, even though schools were actively entering into contracts pursuant to the challenged legislation. Ibid. Also, they had failed to "indicate their intention to prevent reimbursement" for service previously furnished until after this Court's 1971 Lemon ruling. Id. at 197.

The plurality believed that the requested distribution "will not substantially undermine the constitutional interests at stake in Lemon I." Id. at 201. The schools' reliance to their detriment upon payment was also deemed significant. Id. at 203. Lastly, the plurality believed that state governments should not be subjected "to the peril of having their arrangements unraveled" if programs are implemented prior to a judicial determination as to their constitutionality. Id. at 207-208.

We submit that parallel considerations in this case mandate a different result than in Lemon II. First, appellants here made persistent efforts to prevent payment of the funds at issue. To the extent funds were not protected by an escrow arrangement, injunctive relief was requested, but denied. There was no abandonment or failure of any request for injunctive relief as in Lemon II.

Also contrary to the Lemon II appellants' failure to timely indicate their intention to prevent reimbursement for previously furnished services, appellants here consistently expressed their intention to request repayment of aid received. This intention was first expressed in the complaint (see App. 10), and later in briefs and oral arguments.

Also contrary to Lemon II, a failure to grant relief here would seriously undermine the constitutional interests at stake. The inevitable entanglement between the State and church related institutions generated by the institutions' use of funds can be effectively avoided only by repayment thereof. Moreover, unrecovered payments to ineligible institutions for at least three fiscal years would erode the "primary effect" doctrine to a far greater degree than contemplated in Lemon II, where the plurality stated: "that interest is implicated only once under special circumstances that will not recur." Id. at 202.

The reliance problem considered in Lemon II is more difficult to address, because, as the Court noted, "the determination of actual reliance would be subtle, premised largely on credibility and not on facts of record." Id. at 205, n. 6. However, as stated earlier, the absence in Lemon II of at least two factors which persuaded the plurality to give overriding weight to reliance interests are present here. First, injunctive relief was

timely requested here. Cf. Lemon II at 204-205. Second, appellants timely and consistently stated their intention to seek repayment. Cf. Lemon II at 205. Therefore, reliance interests in this case should not be permitted to outweigh the inevitable erosion of the establishment clause generated by failure to order a refund.

Although the plurality in Lemon II expressed reluctance to undermine the initiative of state legislators and executive officials, Id. at 207-208, it acknowledged:

> "This is not to say, of course, that the flexible range of federal injunctive powers should be curtailed so as to permit state officers to proceed with their business regardless of serious constitutional questions concerning state legislation. Indeed, a significant purpose of these tools is to preserve rights of all parties and to confine unnecessary harm during the often protracted pendency of constitutional litigation." Id. at 208, n.8.

The denials of appellants' requests for injunction were inconsistent with such purpose, because they failed to preserve appellants' rights under the first and fourteenth amendments pending this litigation. The only effective redress is to order repayment. Failure to do so would leave appellants totally without remedy as to public

funds paid to the appellee institutions during at least three fiscal years (1972-73, 1973-74, 1974-75). To that extent the first and fourteenth amendments mandate against governmental establishment of religion will have been severely eroded.

Moreover, the absence of any requirement to repay funds can only serve to encourage state governments, albeit in good faith, to enact laws of dubious constitutionality. Maryland is a striking case in point, having enacted the challenged legislation in the fact of a holding by the Maryland Court of Appeals five years earlier that a far more limited form of aid violated the establishment clause. Horace Mann League v. Board of Public Works, supra.

It is true that at the time of enactment, doubt had been cast upon the Horace Mann ruling by Tilton v. Richardson, 312 F. Supp 1191 (D. Conn. 1970). However, the knowledge that funds may be paid with impunity and not recovered, notwithstanding both prior adjudication casting grave doubt upon the constitutionality of authorizing legislation and vigorous efforts to enjoin payment and preserve the status quo pending litigation, can serve only to encourage the passage of dubious legislation. Unless repayment is ordered, appellants and others similarly situated have no effective remedy as to significant aid payments; and the Establishment Clause is severely undermined. Therefore, repayment should be ordered.

CONCLUSION

By reason of the foregoing, the challenged legislation constitutes a law respecting an establishment of religion, and should be declared unconstitutional on its face and as applied. Moreover, the Board of Public Works of the State of Maryland should be permanently enjoined from implementing said legislation; and the appellee institutions should be required to refund all payments made pursuant thereto not enjoined upon motions or application timely filed by appellants.

Respectfully submitted,

Lawrence S. Greenwald

Attorney for Appellants

Melvin L. Wulf
Of Counsel